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Decision

Matter of: Quotient, Inc.

File: B-416473.4; B-416473.5

Date: March 12, 2019

David A. Edelstein, Esq., and Allison Geewax, Esq., Asmar, Schor & McKenna PLLC, for the protester.

Mark Motta, Esq., and Michael Taylor, Esq., Department of Education, for the agency. Louis A. Chiarella, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's corrective action in response to an earlier protest is dismissed where the corrective action rendered the earlier protest academic and where the challenge is otherwise premature.
 2. Protest challenging an agency's decision, as part of corrective action, not to consider earlier clarification responses submitted by vendors is dismissed as untimely.
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DECISION

Quotient, Inc., a small business of Columbia, Maryland, protests the corrective action being taken by the Department of Education, National Assessment Governing Board (NAGB), in connection with the agency's procurement of various website services under request for quotations (RFQ) No. 91995918R0001. Quotient argues that the agency's corrective action is inadequate to address all aspects of earlier protests it filed with our Office, or is otherwise improper.

We dismiss the protest.

BACKGROUND

The procurement here has been a long and contentious one. The RFQ was issued on February 27, 2018, as a small business set-aside to holders of General Services Administration Federal Supply Schedule contracts for information technology supplies

and services (Schedule 70), pursuant to the procedures of Federal Acquisition Regulation (FAR) subpart 8.4.¹ Contracting Officer's Statement (COS) at 34-35; Agency Report (AR), Tab G, RFQ at 77-78. The solicitation contemplated the issuance of a blanket purchase agreement under which fixed-price task orders would be placed for a base year with two 1-year options for the specified NAGB website support services.² RFQ at 80; RFQ amend. 1 at 182. The RFQ established that award would be made on a "best value" basis, using three evaluation factors in descending order of importance: technical, past performance, and price. RFQ at 156.

Five vendors, including J.R. Reingold & Associates, Inc., and Quotient, submitted quotations--consisting of technical, past performance, and business (price) volumes--by the RFQ's March 29 closing date. COS at 45. The agency evaluated vendors' submissions and established a competitive range which included the Reingold and Quotient quotations. Id.

The agency provided Quotient with a list of technical clarification questions on April 24, to which the vendor provided responses on April 30.³ Id.; AR, Tab S, NAGB Technical Questions to Quotient at 347-350; Tab V, Quotient Technical Question Responses at 362-374. On June 1, the agency completed its evaluation of vendors' quotations and ultimately selected the quotation submitted by Reingold for task order award. COS at 45.

On June 13, Quotient filed a protest with our Office challenging the propriety of the award to Reingold. Quotient alleged that the NAGB's evaluation of vendors' quotations under the technical factor and resulting selection decision were improper. On July 30, in response to Quotient's protest, the agency advised our Office that it intended to take corrective action by reevaluating vendors' technical quotations and making a new source selection decision. AR, Tab O, NAGB Letter to GAO, July 30, 2018, at 336. We then dismissed Quotient's protest as academic. Quotient, Inc., B-416473, B-416473.2, Aug. 3, 2018 (unpublished decision).

On October 24, NAGB completed its reevaluation and again selected Reingold for task order award. COS at 47. On October 30, Quotient filed another protest with our Office, challenging the reasonableness of the reevaluation of vendors' technical quotations and resulting award decision. On November 29, the agency advised our Office that it again

¹ The RFQ was amended twice. All citations are to the final version of the solicitation. Additionally, references to page numbers throughout the report are to the sequential numbering provided by the contracting agency.

² Although the evaluation record and the agency's response to the protest here often refer to the receipt of "proposals" from "offerors," the RFQ actually solicited "quotations" from "vendors."

³ Similar technical clarification questions were also sent to the other vendors in the competitive range. COS at 45.

intended to take corrective action by reevaluating vendors' business (price) quotations (including possible exchanges regarding vendors' business quotations) and making a new source selection decision.⁴ AR, Tab P, NAGB Letter to GAO, Nov. 29, 2018 at 339-340.

On December 3, our Office dismissed Quotient's October 30 protest, concluding that the agency's proposed corrective action rendered the protest academic. In the decision, we noted that the protester objected to the dismissal of the protest, arguing the agency's proposed corrective action was "facially futile" and did not commit the agency to resolve the evaluation deficiencies alleged by Quotient. Quotient Objection to Corrective Action, Nov. 30, 2018, at 3-7. Our decision advised that "[t]o the extent Quotient objects to the agency's decision to take corrective action, or to the scope of the corrective action, it may file a protest on these bases, consistent with our Bid Protest Regulations." Quotient, Inc., B-416473.3, Dec. 3, 2018, at 2 (unpublished decision).

On December 6, Quotient filed this protest regarding the terms of the corrective action.

DISCUSSION

Quotient raises a litany of challenges to the scope of NAGB's corrective action. The protester argues the planned corrective action is insufficient to address all aspects of the earlier protests it filed with our Office. In addition, Quotient maintains that it is improper for NAGB not to consider the technical clarifications responses submitted by vendors as part of the agency's reevaluation and new award determination.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. Booz Allen Hamilton, Inc., B-414822.5, Oct. 13, 2017, 2017 CPD ¶ 315 at 3.

As a general rule, agencies have broad discretion to take corrective action where the agency has determined that such action is necessary to ensure fair and impartial competition. Id.; Honeywell Tech. Solutions, Inc., B-400771.6, Nov. 23, 2009, 2009 CPD ¶ 240 at 4. An agency's corrective action need not address every protest issue, but must render the protest academic. SOS Int'l, Ltd., B-407778.2, Jan. 9, 2013, 2013 CPD ¶ 28 at 2-3. An agency's discretion when taking corrective action also extends to a decision on the scope of proposal (or quotation) revisions, and there are circumstances where an agency may reasonably decide to limit the revisions offerors or vendors may make to their submissions. Computer Assocs. Int'l, B-292077.2, Sept. 4, 2003, 2003 CDP ¶ 157 at 5. The details of implementing the corrective action are within

⁴ The NAGB did, in fact, subsequently conduct exchanges regarding vendors' business quotations, including providing vendors with the opportunity to revise their business quotations. COS at 47-48; AR, Tab N, NAGB Email to Vendors, Dec. 7, 2018, at 331-334.

the sound discretion and judgment of the contracting agency, and we will not object to any particular corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. DGC Int'l, B-410364.2, Nov. 26, 2014, 2014 CPD ¶ 343 at 3; Northrop Grumman Info. Tech., Inc., B-404263.6, Mar. 1, 2011, 2011 CPD ¶ 65 at 3.

Our prior decisions have also considered the timing of protests challenging the propriety of an agency's proposed corrective action. In doing so, in those instances where the agency's proposed corrective action alters or fails to alter the ground rules for the competition (*i.e.*, aspects that apply to all offerors or vendors), we have considered a protester's challenge of such to be analogous to a challenge to the terms of a solicitation, thus providing the basis for protest prior to award. Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 7-8; Northrop Grumman Info. Tech., Inc., B-400134.10, Aug. 18, 2009, 2009 CPD ¶ 167 at 10; *see* 4 C.F.R. § 21.2(a)(1). However, in those instances where the agency's proposed corrective action does not alter the ground rules for the competition, we have considered a protester's preaward challenge to be premature. 360 IT Integrated Solutions; VariQ Corp., B-414650.19 *et al.*, Oct. 15, 2018, 2018 CPD ¶ 359 at 10; SOS Int'l, Ltd., B-407778.2, Jan. 9, 2013, 2013 CPD ¶ 28 at 2.

As a preliminary matter, the parties do not dispute that NAGB's corrective action here does not include amending either the solicitation's substantive requirements or its evaluation scheme. Additionally, Quotient raises no objections to the agency's decision to conduct exchanges and evaluate vendors' revised business quotations. Rather, the crux of Quotient's objections is that the agency's corrective action does not go far enough.

The protester essentially argues that because its allegations regarding the agency's technical evaluation are, in its opinion, meritorious, and because the agency's corrective action here does not remedy these errors, the corrective action is thereby deficient.⁵ Protest at 10-19. Quotient also contends that its protest is timely insofar as NAGB has announced its intentions not to reevaluate (again) vendors' technical quotations as part of its corrective action. *Id.* at 10-11. The NAGB argues that Quotient's challenge to the agency's technical evaluation is premature given that no award decision has been made, and merely anticipates prejudicial agency action. Memorandum of Law (MOL) at 12-16. We agree.

We find Quotient's arguments to be premature. It is clear that what Quotient challenges here is the agency's evaluation judgments regarding vendors' technical quotations. Protest at 10 ("NAGB [i]ntends to [l]eave in [p]lace a [t]echnical [e]valuation [t]hat is

⁵ We also note that Quotient does no more than speculate as to the agency's conduct of the reevaluation of vendors' technical quotations, and presumes that the errors initially protested remained unchanged, as NAGB's second corrective action occurred before the development of Quotient's October 30 protest. Protest at 6.

[b]reset [w]ith [e]rrors”). Moreover, an agency’s decision not to reexamine various aspects of the evaluation as part of its corrective action does not effectively incorporate them into the ground rules for the competition. SOS Int’l, Ltd., supra. Accordingly, we view Quotient’s assertions of improper evaluation as premature, given that an award decision has not yet been made. See id.; 360 IT Integrated Solutions; VariQ Corp., supra. Similarly, Quotient’s allegations that the agency failed to engage in meaningful discussions, and that the source selection authority failed to exercise independent judgment, are also premature, where they are raised prior to the award decision. See 360 IT Integrated Solutions; VariQ Corp., supra, at 11; Northrop Grumman Tech. Servs., Inc., B404636.11, June 15, 2011, 2011 CPD ¶ 121 at 4; Supp. Protest at 3-5; Protest at 18-19.

Quotient also challenges NAGB’s decision, as part of corrective action, not to take vendors’ technical clarification responses into account in the agency’s evaluation and award determination. Quotient argues the agency’s decision to base its award decision on vendors’ original technical submissions is “illegal,” and violates the basic contract law principles of offer and acceptance. Protest at 7-10; Comments at 2-8.

As set forth above, NAGB received vendors’ initial quotations by March 29, and then engaged in technical exchanges--which the agency characterized as “clarifications”--on April 24-30. On July 3, NAGB advised our Office that it would take corrective action in response to Quotient’s first (B-416473) protest. Specifically, the agency stated that it would take the following actions:

The Department of Education (“Department”) has decided to take corrective action in the referenced protests. The Department will convene a technical evaluation panel whose function will be to carry out a new technical evaluation of the March 29, 2018 [quotations] of the three vendors originally in the competitive range, including protestor Quotient Inc. (Quotient). The Department will conduct discussions, if necessary, and make a new source selection decision.

AR, Tab O, NAGB Letter to GAO, July 30, 2018, at 336.

The agency thereafter performed a reevaluation of vendors’ technical quotations using a new technical evaluation panel.⁶ As the NAGB contracting officer explains,

In order to conduct this . . . corrective action technical evaluation, on or about July 30, 2018[,] I established an independent technical evaluation panel of three members (“Second TEP”) who are not affiliated with NAGB. . . . In order to constitute a totally independent Second TEP, I did not

⁶ Quotient’s first protest alleged, among other things, that the initial technical evaluation panel (TEP) had treated Quotient unfairly and showed a “clear preference” for Reingold. Protest (B-416473.2) at 17-20.

inform the Second TEP that this evaluation was based on corrective action following a bid protest. In fact, I did not inform the Second TEP that there had been a previous evaluation and award.

COS at 46 (emphasis omitted).

Moreover, relevant to the protest here, the reevaluation of technical quotations did not include consideration of vendors' responses to NAGB's technical clarification questions. Id. at 47.

Quotient argues that its March 29 quotation was "withdrawn" by its April 30 technical clarification response, and that the agency may not make award based on withdrawn "proposals" (i.e., any attempt by NAGB to accept an original proposal is null and void). Comments at 5-8. The NAGB argues that its decision not to consider vendors' technical clarification responses is within the broad discretion afforded agencies when taking corrective action, and that vendors' quotations--initial or revised--were never offers on which government acceptance must be based. MOL at 5-11. Additionally, the agency argues that Quotient's protest here is untimely, insofar as the protester knew or should have known on July 30 that the technical reevaluation was to be based solely on vendors' March 29 quotations, and Quotient did not raise this challenge until December 6. We agree.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without disrupting or delaying the procurement process. CDO Techs., Inc., B-416989, Nov. 1, 2018, 2018 CPD ¶ 370 at 5; Dominion Aviation, Inc.-Recon., B-275419.4, Feb. 24, 1998, 98-1 CPD ¶62 at 3. As relevant here, our Bid Protest Regulations generally require that protests not based upon alleged improprieties in a solicitation "shall be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier)" 4 C.F.R. § 21.2(a)(2).

On this record, we think Quotient knew or should have known by July 30 that the agency did not intend to consider vendors' clarification responses as part of its technical reevaluation. The agency's July 30 notice of corrective action stated that NAGB would "carry out a new technical evaluation of the March 29, 2018 [quotations] of the three vendors in the competitive range," including that of Quotient. AR, Tab O, NAGB Letter to GAO, July 30, 2018, at 336. Quotient, however, has maintained that its March 29 quotation had been completely withdrawn. Protest at 9; Comments at 5. Inasmuch as the agency's July 30 letter made it clear that the technical reevaluation was going to be based on a quotation that Quotient believed withdrawn, we find any protest of this alleged impropriety had to be filed within 10 days thereof.⁷ As Quotient did not file its

⁷ We also find no merit in Quotient's subsequent assertion that it reasonably interpreted NAGB's statement to mean the "clarified" March 29 submissions, when it previously
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protest challenging the agency's decision to base its technical evaluation on an allegedly withdrawn quotation until December 3, this protest is untimely.

In any event, we also find the agency's decision to essentially disregard vendors' technical clarifications as part of its corrective action does not provide a basis on which to sustain the protest. Contracting officials have broad discretion to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition. Domain Name Alliance Registry, *supra*, at 8. An agency's discretion in the area of corrective action extends to deciding the scope of proposal or quotation revisions, and there are circumstances where an agency may reasonably decide to limit the revisions offerors or vendors may make to their submissions. *Id.* (finding an agency's decision, as part of corrective action, to disregard discussions that had occurred with one offeror to be reasonable); Computer Assocs. Int'l, *supra*.

Here, Quotient's first protest essentially alleged that the first TEP was biased; it had treated the protester unfairly and had demonstrated an improper preference for Reingold in its evaluation. The agency, when deciding how to remedy this alleged defect, decided to constitute a new technical evaluation team to conduct a new evaluation of quotations, completely independent of the first TEP. COS at 47. Moreover, as part of ensuring an independent evaluation review, the second TEP was not informed that there had been a previous evaluation, nor were they made aware of the earlier technical clarification questions or the vendors' responses. It was, after all, only the first TEP that was of the opinion that vendors' submissions needed clarifying in certain areas.⁸ While it is quite uncommon for an agency to try to "unring a bell," and exclude consideration of additional information received from vendors, we think the agency's actions here were a reasonable means of remedying a reasonable concern, so as to ensure a fair and impartial competition. See 360 IT Integrated Solutions; VariQ Corp., *supra*, at 10.

Finally, we also find the decisions of our Office on which Quotient relies for the proposition that the submission of a revised offeror extinguishes an agency's right to accept an earlier offer, see, e.g., Department of the Army--Recon., B-251527.3, Sept. 17, 1993, 93-2 CPD ¶ 178, to be inapposite here; instead, these decisions demonstrate the protester's misunderstanding of the difference between a request for

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asserted that its March 29 submission was a withdrawn one. Compare Protest at 8 ("NAGB has stated a clear intent to violate procurement law . . . by 'accepting' an offer that was withdrawn") with Comments at 3 ("Quotient reasonably interpreted NAGB's statement that it would review the 'March 29, 2018 proposals' to mean the 'clarified' March 29, 2018 proposals"). Quite simply, Quotient cannot have it both ways and basically re-characterize its belief as the situation requires.

⁸ The second TEP did not believe that any exchanges (clarifications or discussions) with vendors were needed as part of its technical evaluation. COS at 47.

quotations and a request for proposals (RFP). An RFQ, unlike an RFP (or an invitation for bids), does not seek offers that can be accepted by the government to form a contract. Dehler Mfg. Co., Inc., B-416601, Oct. 25, 2018, 2018 CPD ¶ 368 at 3. Rather, vendor quotations are purely informational. Computer Assocs. Int'l, Inc.--Recon., B-292077.6, May 5, 2004, 2004 CPD ¶ 110 at 3. In the context of an RFQ, it is the government that makes the offer, albeit generally based on the information provided by the vendor in its quotation, and no binding agreement is created until the vendor accepts the offer. A vendor submitting a price quotation therefore could, the next moment, reject an offer from the government at its quoted price. Id.; FAR § 13.004(a), (b). Because vendors in the RFQ context hold the power of acceptance, it simply does not make sense to apply the concept of offer and acceptance from our decisions discussing RFPs. Here, there is frankly no requirement that Quotient, or any other vendor, accept an offer made to it by the agency, whether such offer is based on a "withdrawn" quotation or on a technical quotation which may have incorporated prior clarifications.

The protest is dismissed.

Thomas H. Armstrong
General Counsel